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FALLING BETWEEN THE CRACKS

ELLEN CHUN*

ATTORNEY FOR THE DAMNED: A LAWYER'S LIFE WITH THE CRIMINALLY INSANE 77-99 (1996). By DENIS WOYCHUK. New York: The Free Press. 1997. Pp. 226.

The criminal justice and mental health systems are two distinct forms of governmental social control which are based on distinguishable criteria, but they sometimes operate in a suspiciously similar fashion. Our legal system which operates on the basis of objectively verifiable evidence, often clashes with the mental health system, which often relies on subjective evidence.¹ Whereas the law looks towards an attainable truth, mental health focuses on the unconscious processes, anxieties, and defenses as the causes of human behavior.²

Although the two systems do not always invoke similar methods in the treatment of those that vacillate between them, both aspire to maintain a perception that they are free from bias by the use of the "neutral expert."³ Some commentators consider this term to be an oxymoron.⁴ Covert biases are particularly damaging where competency evaluations and insanity defense pleas hinge on the strength of "neutral" expert testimony.⁵ As studies and statistics repeatedly demonstrate, racism is pervasive throughout the criminal justice and mental health systems.⁶ This has had a disparate impact on many minority populations, especially on black defendants who are disproportionately caught

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¹ See Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 131 (1991) [hereinafter Perlin, *Morality and Pretextuality*].

² See *id.*

³ See generally R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 11 (1987); Jeffrey J. Parker, Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S. CAL. L. REV. 1363, 1385-86 (1991). According to Dr. Veena Soni Raleigh, a member of the Mental Health Foundation, there is overwhelming evidence that blacks are subjected to greater coercive control by actors in both the psychiatric and criminal justice systems. See Glenda Cooper, *Mental Health Care Fails Ethnic Minorities*, INDEPENDENT (London), Nov. 7, 1995, at 12.

⁴ See Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 641 (1993) [hereinafter Perlin, *Case of Competency*].

⁵ See CHARLES E. OWENS, MENTAL HEALTH AND BLACK OFFENDERS 1, 1 (1980).

⁶ See generally *id.* at 1-13.

between the interstices of both systems.⁷ The significance of how racism invidiously operates to the effect of swallowing up a black criminal deemed “mentally incompetent” is illustrated by the experience of Mtumbo Balinka as described by Denis Woychuk.⁸

Denis Woychuk's book, *Attorney for the Damned: A Lawyer's Life with the Criminally Insane*, provides a personal account of his career with the criminally insane through a colorful collage of client narratives.⁹ Woychuk's book primarily focuses on the inadequacies in the obscure but crucial corner of the criminal justice system. It is concerned with striking a balance between the rights of mental patients with the rights of the public to be protected from the criminally insane.¹⁰ Woychuk's clients included child abusers, rapists, cannibals, sadists, and killers.¹¹ His vision of the law is that the more unpopular the defendant the more compelling is the lawyer's duty to take the case.¹²

Tantamount to an unapologetic diary, Woychuk unfolds grueling descriptions of horrors and human tragedy, while candidly revealing a plethora of problems within the criminal justice and mental health systems.¹³ One of the most compelling problems Woychuk addresses is the interplay between the criminal justice and mental health systems and race.¹⁴ He discusses how misinformed dialogue operates to distort both the competency evaluations and the use of the insanity defense for many black defendants.¹⁵ More specifically, Woychuk suggests that

⁷ See *id.* One in three young black men is under some form of custodial supervision, in comparison to one in eight young Hispanic men and one in fifteen young white men. See Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* (The Sentencing Project, Washington, D.C.), Feb. 1990, at 3.

⁸ See generally DENIS WOYCHUK, *ATTORNEY FOR THE DAMNED: A LAWYER'S LIFE WITH THE CRIMINALLY INSANE* 77-99 (1996).

⁹ See *id.* At the time Woychuk wrote the book, he was a lawyer for New York's Mental Hygiene Legal Services and was a lawyer at Kirby Forensic Psychiatric Center, New York's maximum security hospital for the criminally insane. See *id.* at ix, 2, 12, 18.

¹⁰ See *id.* at 207-23. Woychuk reviews the validity of the insanity defense eventually concluding that it is not very useful because the public sees it as an easy way out that encourages violent crimes, allowing the guilty to literally get away with murder. See WOYCHUK, *supra* note 8, at 201, 204. He is concerned, however, that most of the dangerously ill are in prisons rather than hospitals and that they tend to be incarcerated for less time and get out more easily than those who have been sent to mental hospitals. See *id.* at 207-08. He concludes that mental hospitals, despite shortcomings, do a better job of protecting society than do prisons. See *id.* at 209.

¹¹ See *id.* at ix.

¹² See WOYCHUK, *supra* note 8, at ix.

¹³ See generally *id.*

¹⁴ See *id.*

¹⁵ See *id.* at 87, 89.

racial biases in diagnoses may affect competency evaluations and the insanity defense of black defendants because both often hinge on the strength of misinformed diagnostic testimony.¹⁶ The most striking example of this is illustrated by the experience of Mtumbo Balinka, a Sudanese immigrant.¹⁷

Part I of this book review will distill the pervasive impact of racial overtones throughout the mental health and criminal justice systems through the illustration of Mtumbo Balinka's experience. Part II will focus on the sufficiency of legal mechanisms to seek redress for racism in competency evaluations and insanity defense pleas of black criminal defendants. Finally, Part III will focus on the need for effectuating more racially balanced treatment for black defendants who fall between the cracks of the criminal justice and mental health systems.

I. MTUMBO BALINKA

In Denis Woychuk's chapter, ironically entitled "Land of Opportunity," the reader is introduced to Mtumbo Balinka, an undocumented Sudanese immigrant arrested on misdemeanor charges.¹⁸ Woychuk first met Balinka at the Manhattan Psychiatric Center (MPC).¹⁹ Balinka's current mental condition was at issue when the staff doctor at MPC recommended he be retained and forcibly medicated.²⁰ The doctor's decision was based on Balinka's consistent refusal to take his medication, retention of residual delusions, and indicated patterns of violence.²¹

¹⁶ See WOYCHUK, *supra* note 8, at 89-98.

¹⁷ See generally *id.* at 77-99.

¹⁸ See *id.* at 77, 83. The irony of the title, "Land of the Opportunity," is glaring when one compares the experience of Mtumbo Balinka with a quote from a Sudanese immigrant who describes what the United States represented to many Sudanese: "Some thought United States was a country that floats in air, like paradise, not connected to land." Michael Lollar, *The Mark of a People Forgotten Refugees' Scars Made in Sudan, Felt in America*, COMMERCIAL APPEAL (Memphis), Aug. 4, 1996, at E1.

¹⁹ See WOYCHUK, *supra* note 8, at 77. Manhattan Psychiatric Center (MPC) is a low security civil hospital that houses almost nine hundred patients. See *id.* at 2.

²⁰ See *id.* at 78-79, 86.

²¹ See *id.* Contested commitment cases regularly turn on a very specific question of competency: is the patient sufficiently competent to "do the right thing," namely, take prescribed antipsychotic medication in a community setting? See generally Perlin, *Case of Competency*, *supra* note 4, at 627.

If he is seen as a good self-medication risk, he is then competent to exercise medical decision making autonomy (and, not coincidentally, is less likely to be found in need of involuntary civil commitment). If he is not, this reflects a level of incompetency that frequently is translated immediately to a finding of a need for institu-

Balinka was arrested at the age of eighteen while attempting to protect his boss's stock of pornographic magazines from plain clothes officers.²² Unaware of the fact that the men were police officers, Balinka resisted confiscation.²³ When one of the officers tried to grab him, Balinka ducked and ran.²⁴ The undercover officers cornered him, cuffed him, and charged him with menacing, possession of a weapon—a cutter that newspaper vendors use to open the cord that binds their newspapers—and resisting arrest.²⁵ Unable to make bail, Balinka was sent to Rikers Island.²⁶

Woychuk points out that the injustice of his client's case primarily turned on the fact that Balinka was black.²⁷ The author notes that as a first time offender facing misdemeanor charges, the likelihood of a white defendant being sent to a prison like Rikers is highly unlikely.²⁸ According to the National Council on Crime and Delinquency, a black youth with a felony offense is over three times more likely to be committed to a high security institution than a white youth with the same offense.²⁹ These statistics are illustrated by the general demographics of Rikers' prison population which consists of sixty-five percent blacks, twenty-five percent Latinos, and only seven percent whites.³⁰

Throughout the story of Mtumbo Balinka, Woychuk emphasizes the striking disparity of treatment between whites and blacks hedging the criminal justice and mental health systems.³¹ For example, a young, white defendant would tend to stand out and receive attention from

tionalization. Competency is reduced to a sterile cause-and-effect cell where a prediction that a patient is not likely to take medication in the community (evidence of his incompetency to make "correct" decisions) becomes the dispositive evidence at the involuntary civil commitment hearing, a proceeding that would appear to necessarily focus on a host of other questions.

Id.

²² See WOYCHUK, *supra* note 8, at 83.

²³ See *id.* at 92–93.

²⁴ See *id.* at 93.

²⁵ See *id.*

²⁶ See WOYCHUK, *supra* note 8, at 83. Rikers Island prisons are one of the largest jail complexes in the country and have a notorious reputation for holding the city's "worst-behaved prisoners." See Paul Moses & Patricia Hurtado, *FBI Probing Rikers Guards*, *NEWSDAY*, Nov. 21, 1995, at A18.

²⁷ See WOYCHUK, *supra* note 8, at 86.

²⁸ See *id.*

²⁹ See generally JAMES AUSTIN, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *THE OVER-REPRESENTATION OF MINORITY YOUTH IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM: PERCEPTIONS AND REALITIES IN MINORITIES IN JUVENILE JUSTICE* 14 (Kimberly Kempf Leonard et al. eds., 1995).

³⁰ See WOYCHUK, *supra* note 8, at 86.

³¹ See *id.* at 86–87.

prison doctors, whereas a black defendant is expected to do his time "standing up."³²

Balinka's time paid "standing up" began almost immediately upon his arrival at Rikers Island.³³ In addition to the borage of intimate propositions made by other men whom he was waiting with in a tiny holding cell, Balinka began to question whether his undocumented immigration status would be discovered.³⁴ Fearing sexual assault and deportation, Mtumbo Balinka lost control and began to rant and rave uncontrollably for days.³⁵

After several days of crying, screaming, and cowering on his cot, the guards reported Balinka as a "matter of concern."³⁶ His own lawyer diagnosed Balinka as hysterical and suggested that he be evaluated by the prison psychiatrist.³⁷ During the competency evaluation, Balinka began to scream of rape and of being tracked down by Federal agents.³⁸ The two psychiatrists who had examined him concluded that he was a paranoid psychotic who did not understand the nature of the charges against him and thus was deemed incompetent to stand trial ("IST").³⁹ Within three weeks of his arrival at Rikers, Balinka was sent to MPC for "treatment."⁴⁰

Woychuk reminds us that, although mental illness is blind to class and race, "some just get a greater benefit of the doubt."⁴¹ He intimates that the doctors easily attributed Balinka's illness to violent inclinations and delusional psychoses, rather than self-defense and panic was because of the therapist's biased presumption that blacks live in an actively violent criminal culture.⁴² Mtumbo Balinka's panic was initially

³² See *id.* In contrast to 800 white males per 100,000 that are incarcerated in this country, 6753 black males are incarcerated for every 100,000. See *African Americans and the Criminal Justice System*, LEGAL INTELLIGENCER, Feb. 5, 1996, at 8.

³³ See WOYCHUK, *supra* note 8, at 83.

³⁴ See *id.* Many Sudanese immigrants fleeing from their homeland to the United States leave behind the terrors of civil war, fears of religious persecution, killings, torture, enslavement and other human rights abuses that the Government of Sudan arbitrarily inflicts on the Sudanese population. See *EU/ACP: Joint Assembly Criticises Repressive Regimes*, EUR. REP., Oct. 2, 1996, at No. 2162.

³⁵ See WOYCHUK, *supra* note 8, at 83.

³⁶ See *id.* at 84.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See WOYCHUK, *supra* note 8, at 84.

⁴⁰ See *id.*

⁴¹ *Id.* at 87.

⁴² See *id.* at 79, 87. Experts often slot their patients into certain categories and prescribe a similar regimen for all. See Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 117 (1991) [hereinafter Perlin, *Power Imbalances*]. In

misdiagnosed at Riker's Island and was the basis for his continual misdiagnosis at MPC.⁴³ By the time Balinka arrived at MPC, he no longer harbored persistent manifestations of any persecutory delusions.⁴⁴ During an initial evaluation at MPC, however, Balinka expressed that he was "railroaded" into the hospital. The staff doctor, a recent Korean immigrant, then erroneously concluded that he had delusions of arriving at the hospital by train.⁴⁵ For his "atypical psychoses," Balinka was promptly treated with heavy doses of psychotropic medication.⁴⁶

On another occasion, an altercation arose with a fellow patient who was substantially taller and heavier than Balinka.⁴⁷ Upon Balinka's refusal to appease his demands for money and cigarettes, the other patient struck him with a chair at which point Balinka responded with defensive blows.⁴⁸ Rather than interpreting Balinka's behavior as self-defense, the staff doctor documented it as an indication of violent tendencies.⁴⁹

Balinka's experience with the criminal justice and mental health systems illustrates one of the major issues Woychuk would have to contend with: MPC's "experts" would be providing the diagnostic testimony and they were hardly free from bias.⁵⁰ Consultation with diagnostic testimony is necessary where the issue at bar is the current mental condition of the patient.⁵¹ At the time that Woychuk took over the case, Balinka had spent nearly two years at MPC and his doctors were seeking to retain him for another eighteen months.⁵² The issue was whether Balinka needed continued hospitalization or whether Balinka should be released on the premise that his time served was a result of justice gone awry and latent racism had played a role from the very beginning.⁵³ The doctors at MPC could keep Balinka forever

addition, clinicians significantly overestimate their diagnostic and predictive accuracy, and ignore supplemental means of interpretation that might enhance their accuracy. See David Faust, *Data Integration in Legal Evaluations: Can Clinicians Deliver on Their Promises?*, 7 BEHAV. SCI. & L. 469, 480 (1989).

⁴³ See WOYCHUK, *supra* note 8, at 89.

⁴⁴ See *id.* at 86.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See WOYCHUK, *supra* note 8, at 90.

⁴⁸ See *id.* at 82, 90.

⁴⁹ See *id.* at 89.

⁵⁰ See *id.*

⁵¹ See WOYCHUK, *supra* note 8, at 88-99.

⁵² See *id.* at 92; see also Jeffrey J. Parker, Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 62 S. CAL. L. REV. 1363, 1363 (1991).

⁵³ See WOYCHUK, *supra* note 8, at 78.

if they could show the court that he needed continued in-patient treatment.⁵⁴ Ironically, if Balinka had been convicted of every criminal charge against him, his maximum sentence would have been days rather than years.⁵⁵

Woychuk eventually convinced the court that Balinka's retention was a result of consistent misdiagnoses.⁵⁶ Woychuk confessed that, in addition to the strength of the arguments supporting misdiagnoses, he hoped that Balinka's small size would "overcome his blackness."⁵⁷ In the closing words of Balinka's narrative, Woychuk invites the reader to consider whether a patient should have therapy and perhaps legal representation provided by people of his own cultural background.⁵⁸ He warns that such a consideration is not without its own problems.⁵⁹

Woychuk's personal portrayal of the impact of racism within the mental health system suggests that race has a considerable impact upon criminal justice.⁶⁰ Through Mtumbo Balinka's story, Woychuk exposes the tragic consequences of racial biases in psychiatric evaluations of black defendants within the criminal justice system.⁶¹ By exploring racism in the psychiatric diagnoses used for competency evaluations and insanity defense pleas of black defendants, we are better able to seek redress for black criminal defendants caught between the criminal justice and mental health systems.

II. THE SUFFICIENCY OF LEGAL MECHANISMS TO SEEK REDRESS FOR RACISM IN COMPETENCY EVALUATIONS AND INSANITY DEFENSE PLEAS

Crime, incarceration and detention in the United States are intimately associated with race and racism.⁶² Blacks, whether adults or

⁵⁴ See *id.* at 79.

⁵⁵ See *id.*

⁵⁶ See *id.* at 89-96.

⁵⁷ See WOYCHUK, *supra* note 8, at 89.

⁵⁸ See *id.* at 98-99.

⁵⁹ See *id.* Woychuk explains that according to his experience, most black doctors, lawyers and judges are not drawn from the urban poor, but from either the suburban middle class or countries outside the United States, neither which is closely related to the black inner-city experience. See *id.*

⁶⁰ See WOYCHUK, *supra* note 8, at 98-99. The job of making sure the client does not go out and wreak havoc on others falls to the district attorney's office or the hospital's lawyers. See *id.* Factor in psychiatrists, psychologists, probation officers, and police, each offering their own opinion on which way the scales should tip and Woychuk's message becomes clear: that placing defendants in the "appropriate setting" is as easy and profitable as making a living playing the lottery. See *id.* at 209.

⁶¹ See *generally id.* at 77-99.

⁶² See *generally* OWENS, *supra* note 5, at 1-13.

youths, are involuntarily detained disproportionately more often than whites.⁶³ One study indicates that overall arrest rates for blacks is four times that of whites, and the arrest rates for murder, in particular, are ten times that of whites.⁶⁴ Moreover, blacks outnumber whites in correctional institutions nine to one.⁶⁵

According to Dr. Charles Owens, a prominent black mental health expert, despite the overrepresentation of blacks in the crime statistics, explanations by blacks for crimes committed by blacks is noticeably absent.⁶⁶ The result is a lopsided explanation of black crime where "not only has the criminal justice been administered by whites, but definitions and theories of the causes of crime, and the interpretation of research conducted on blacks have also reflected a white perspective."⁶⁷ Due to traditional white normalcy standards of mental evaluation and lack of knowledge with regards to black offender behavior, entrenched systematic racism has simply been tailored to the misperceived socio-economic and cultural realities of black defendants.⁶⁸ According to Owens, the traditional method for judging black mental health has been to compare blacks to the majority white culture and to use white standards as the norm of acceptance.⁶⁹ This has inevitably resulted in blacks being found deficient and inadequate in almost every consideration.⁷⁰ The consequence of misinformed evaluations is that many blacks do not receive the treatment that they require while being funneled through the criminal justice system.⁷¹

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See OWENS, *supra* note 5, at 13.

⁶⁷ *Id.*

⁶⁸ See *id.* at 87, 98.

⁶⁹ See OWENS, *supra* note 5, at 30.

⁷⁰ See *id.* According to a spokesperson for the Mental Health Foundation, there are "worrying differences" between the way in which white people and those from ethnic minorities receive health care where it is clear that social services and health agencies are failing black and minority populations. See Cooper, *supra* note 3, at 12. The spokesperson further added that "it is time to make improvements in service provision now so that these communities receive care and treatment which recognizes their cultural differences and meets their needs." *Id.*

⁷¹ See Todd W. Martin & Henry J. Grubb, *Race Bias in Diagnosis and Treatment of Juvenile Offenders: Findings and Suggestions*, 20 J. CONTEMP. PSYCHOTHERAPY, 259, 259 (1990). According to this study, blacks are less often accepted for therapy, are often assigned to inexperienced therapists, and are seen for shorter periods of time. See *id.* at 262. Further studies have shown that therapists "generally appear to prefer and are more comfortable with middle- and upper-class clients, that is, clients who are more similar to themselves." OWENS, *supra* note 5, at 78.

The fact that blacks comprise a disproportionate share of individuals involuntarily held in public mental institutions is not surprising.⁷² One study reveals that the black population in these institutions exceeds the white population by fifty-two percent.⁷³ One reason is that the mental health professional community has not accumulated a knowledge based on black offender behavior that can be used reliably by its membership to guide its interaction with black offenders.⁷⁴ The unchecked authority of mental health professionals, coupled with the ability for misinformed evaluations, cannot be overlooked when statistics reveal a striking disparity between black and white involuntary mental patients.⁷⁵

Psychiatric evaluations for competency and for insanity defense pleas both presumptively rest upon expert testimony.⁷⁶ This implies significant ramifications when considering that legal decisionmakers, such as judges and juries, often defer to the testimony of misinformed mental health experts.⁷⁷

A. Competency Evaluations

Compared to white defendants, black defendants are disproportionately committed for competency evaluations.⁷⁸ A competency evaluation is a procedure reserved for individuals accused of a criminal act when there is some doubt as to whether they are mentally competent either to understand the trial proceedings or to participate in their own defense.⁷⁹ Prior to the trial, the individual is remanded to a mental institution to determine if he is competent to stand trial.⁸⁰ Those individuals declared incompetent to stand trial are then confined to

⁷² See generally Kenneth Lindsey & Gordon Paul, *Involuntary Commitments to Public Mental Health Institutions: Issues Involving the Over-Representation of Blacks and Assessment of Relevant Functioning*, 106 PSYCHOL. BULL. 171, 171 (1985).

⁷³ See Cannon & Locke, *Being Black is Detrimental to One's Mental Health: Myth or Reality*, 38 PHYLON 408, 410 (1977).

⁷⁴ See OWENS, *supra* note 5, at 16. Culturally appropriate behaviors may be perceived through a biased eye as a mental disorder, which in turn, may lead to unnecessarily, prolonged commitment. See Lindsey & Paul, *supra* note 72, at 171.

⁷⁵ See OWENS, *supra* note 5, at ix.

⁷⁶ See Perlin, *Morality and Pretextuality*, *supra* note 1, at 131-32.

⁷⁷ See Hava B. Villaverde, Note, *Racism in the Insanity Defense*, 50 U. MIAMI L. REV. 207, 237 (1995).

⁷⁸ See OWENS, *supra* note 5, at 27.

⁷⁹ See *id.*

⁸⁰ See *id.*

mental institutions indefinitely.⁸¹ Although the intended purpose of the procedure is to assess the mental status of an individual, it has been expanded to accommodate other needs of those involved in the adversarial process.⁸² As in Mtumbo Balinka's case, incompetency to stand trial has been used as a procedure employed to confine certain undesirable individuals indefinitely without the benefit of due process.⁸³ According to a study, assessors have a tendency to clinically overstate the degree of psychopathology particularly in black defendants, consequently inflating the number of blacks who work their way through the competency evaluation process.⁸⁴ The disparity then is not necessarily a statement of black defendant psychopathology but more a reflection of distorted evaluations of black defendants by mental health experts.⁸⁵

B. *Insanity Defense Pleas*

The court and the mental health professional are faced with much the same kind of task in insanity cases as in questions of other legal competencies: assessment and consideration of the defendant's psychological capacities.⁸⁶ Thus, the diagnosis, as in competency evaluations, is crucial to the success of the insanity plea.⁸⁷

From all indications, blacks do not constitute a sizable percentage of those entering not guilty by reason of insanity pleas ("NGRI").⁸⁸ Due to the bias entrenched in the process of evaluation, there are powerful inducements for a black defendant not to enter an NGRI plea when he assesses the reality of the possible consequences.⁸⁹

Despite its infrequent use, one of the most publicized and controversial areas where the mental health and criminal justice systems intersect is the insanity defense doctrine.⁹⁰ The basis of the insanity defense is the principle that insane persons should be excused from

⁸¹ See *id.* at 27.

⁸² See OWENS, *supra* note 5, at 27.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.* at 28.

⁸⁶ See OWENS, *supra* note 5, at 4.

⁸⁷ See generally *United States v. Byers*, 740 F.2d 1104, 1139 (D.C. Cir. 1984).

⁸⁸ See OWENS, *supra* note 5, at 25.

⁸⁹ See *id.*

⁹⁰ See Peter Arenella, *Reflections of Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 271 (1982).

criminal responsibility because only an act knowingly and willingly committed should be considered a criminal offense.⁹¹ Success of the defense is not equivalent to an assertion that society approves of the defendant's behavior.⁹² Rather, it is a social policy that allows defendants who would otherwise be found guilty to be spared the moral condemnation that accompanies criminal conviction.⁹³ In other words, due to some extenuating circumstance, such persons are not deemed criminally responsible.⁹⁴

To protect the public, the law often imposes far greater restrictions on NGRI defendants than those imposed upon ordinary citizens or even upon criminal convicts.⁹⁵ The absence of criminal liability, however, does not mean that a defendant who successfully asserts an insanity defense will go unpunished.⁹⁶ If a mentally insane person commits a murder, the person may successfully assert a NGRI defense and be absolved of criminal responsibility because of his mental condition.⁹⁷ Despite the successful defense, the law may confine the person to a mental hospital for several years, requiring the patient to undergo extensive psychiatric or medical treatment.⁹⁸

Interestingly, over ninety percent of criminal defendants actually plead guilty.⁹⁹ This means that less than ten percent of all defendants

⁹¹ See Scott Leigh Sherman, *Guilty But Mentally Ill: A Retreat from the Insanity Defense*, 7 AM. J.L. & MED. 237, 237 (1981).

⁹² See Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 952 (1987).

⁹³ See *id.*

⁹⁴ It is important to also note that there are recent trends in state legislatures to address the public's hostility towards the insanity defense by adopting a bill entitled, "Guilty but Mentally Ill." See generally Sherman, *supra* note 91, at 237-64. This bill aims to decrease the availability of the insanity defense by changing the current standard for acquittal which precludes convicting defendants who lack responsibility for their criminal responsibility due to mental illness. *Id.* at 239.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See Sherman, *supra* note 91, at 252.

⁹⁸ See *id.* Woychuk also suggests that like much of the public, many of his clients are fooled by myths that surround the insanity plea. See WOYCHUK, *supra* note 8, at 152-53. He emphasized the importance of relaying to his clients that, if he or she did raise the insanity plea at the criminal trial and is unsuccessful, statistics indicate that he or she will probably get a longer sentence. *Id.* He also informs his clients that if he or she is successful, the consequences may be worse since rarely does a successful insanity defense lead to a quick release. *Id.*

⁹⁹ See Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385, 386 (1992).

plead not guilty.¹⁰⁰ Less than one percent of all “not guilty” pleas in the criminal justice system are insanity pleas.¹⁰¹ Of those asserting the insanity defense, only one quarter are actually acquitted as NGRI.¹⁰² This translates to a minute segment of the criminal population where only .02% of all defendants who plead not guilty are acquitted NGRI.¹⁰³

It is difficult to reconcile the finding that a plea of NGRI is entered primarily by white defendants with the conclusion that race is not a factor in the success of insanity pleas.¹⁰⁴ Studies of the insanity defense identify those who plead NGRI as “primarily single, [c]aucasian, somewhat older and better educated than the usual defendant group, unemployed at the time of the insane offense, and with a history characterized by chronic unemployment, prior psychiatric treatment, drug abuse, alcohol abuse, and previous arrests.”¹⁰⁵

Although the burden of proof in an insanity defense case varies by state, the United States Supreme Court determined that the burden of proof can be placed upon the defendant regardless of the standard’s stringency.¹⁰⁶ Judges often instruct the jury that, although the defendant must plead the insanity defense, the prosecution must still prove beyond a reasonable doubt every element of the crime, including the requisite state of mind.¹⁰⁷ These strict standards are upheld during judicial proceedings and are subject to the legal standards governing the insanity defense itself.¹⁰⁸

In 1962, the American Law Institute (ALI) adopted the following standard in its Model Penal Code, section 4.01, which a majority of states have subsequently accepted: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.”¹⁰⁹ The ALI standard does not refer to the act as a result

¹⁰⁰ See *id.*

¹⁰¹ See Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334 (1991).

¹⁰² See *id.* at 335.

¹⁰³ See *id.*

¹⁰⁴ See Richard A. Pasewark et al., *Differentiating Successful and Unsuccessful Insanity Plea Defendants in Colorado*, J. PSYCHIATRY & L. 54, 55 (1987).

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., *Rivera v. Delaware*, 429 U.S. 877 (1976).

¹⁰⁷ See, e.g., *Leland v. Oregon*, 343 U.S. 790 (1952).

¹⁰⁸ See THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENT AND INSTRUMENTS* 4 (1993).

¹⁰⁹ GRISSO, *supra* note 108, at 159.

of the disease or mental incapacity; rather, it requires that "but for the disease" the incapacities would not have been in effect at the time of the defendant's behavior.¹¹⁰

In 1984, the American Bar Association unsuccessfully proposed eliminating the volitional component of the ALI standard where it is reasoned that mental health experts cannot properly testify about defendants' volitional capacities because such testimony would be based upon moral assumptions, not scientific principles.¹¹¹ The ABA's proposed standard narrows the psychologist's testimony to purely observable behaviors measured by diagnostic tests based upon a normative scale of behavior, that, as seen earlier, disfavors blacks.¹¹² This paradox surfaces from the requirement of a "behavioral standard" conforming to *white* behavior.¹¹³ "There exists the danger of a [w]hite therapist dismissing evidence of psychological disturbance as merely reflecting the subculture of the black patient."¹¹⁴

C. *Redress for Racism in Competency Evaluations and Insanity Defense Pleas*

The dubious question is whether there can be a truly neutral expert testifying within the criminal justice system. "Mental health experts have been criticized for offering testimony that may be intentionally or unintentionally biased."¹¹⁵ Biased testimony can be defined as issuing opinions, recommendations, or conclusions that are colored or distorted as a result of personal, theoretical, or overtly extraneous situations or individual factors.¹¹⁶ This could have significant ramifications when considering that legal decision makers, such as judges, often defer to the testimony of those mental health professionals.¹¹⁷

As demonstrated by the MPC experts in the case of Mtumbo Balinka, the testimony of forensic experts may reflect a veiled bias, as they frequently testify according to their own self-referential concepts

¹¹⁰ See *id.* at 160.

¹¹¹ See *id.* at 160–61.

¹¹² See GRISSE, *supra* note 108, at 160–161.

¹¹³ See *id.* at 161.

¹¹⁴ Martin & Grubb, *supra* note 71, at 262.

¹¹⁵ Jean C. Beckham et al., *Decision Making and Examiner Bias in Forensic Expert Recommendations for Not Guilty by Reason of Insanity*, 13 LAW AND HUM. BEHAV. 79, 80 (1989).

¹¹⁶ See Perlin, *Power Imbalances*, *supra* note 42, at 117. When a neutral expert testifies, a multiplicity of interests are being represented. See *id.* The forensic evaluator may also weigh—consciously or unconsciously—community, social and political values, availability of hospital space, or potential fear of liability. See *id.*

¹¹⁷ See Villaverde, *supra* note 77, at 237.

of values.¹¹⁸ Judges and jurors, consciously or unconsciously, will often rely on these reductionist diagnoses which further contaminates the process.¹¹⁹ Consequently, a system develops in which judges and jurors blindly succumb to the allure of "expert" testimony, thereby disingenuously depriving individuals of liberty.¹²⁰

Examining the way that "neutral" experts testify in the evaluations of black defendants' competencies and insanity defense pleas may promote a better understanding of the extent of the prevailing biases.¹²¹ This understanding will encourage new strategies for confronting the underlying biases, creating a new structure, and developing a new agenda through which these issues can be examined openly.¹²²

The belief that professionals do not impose their own values on their clients and that they have no goals beyond advancing the client's interest is the principal reason why professional pronouncements are taken as persuasive.¹²³ If it is true that professionals' decisions and diagnoses are based upon self-referential concepts of normative values, and judges rely upon this mechanism, then personal bias of the decision makers in the courtroom seems inescapable.¹²⁴ The issue of hidden racial biases within the evaluation or treatment should be raised at every stage where black criminal defendant decisions are made.¹²⁵ While it is difficult to prove these biases exist, it is nonetheless important to recognize their existence. Recognition of such biases may effectuate fairer treatment for black defendants who travel between the revolving doors of the mental health and criminal justice systems.¹²⁶

¹¹⁸ See Perlin, *Case of Competency*, *supra* note 4, at 629.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.* at 630. *United States v. Byers* illustrates the grave potential for abuse that inheres in the court ordered psychiatric evaluation. See 740 F.2d 1104, 1141. In his dissent, Judge Bazelon states,

The government psychiatrist is armed with the same technical expertise as the private psychiatrist. He is trained to gain the confidence of a patient. . . . Unlike the policeman, whose goals and methods engender wariness in the defendant, the government psychiatrist in the state hospital engenders trust. But this trust is unwarranted. The psychiatrist's aim is diagnosis, not therapy. His primary commitment is to his institution, not to his patient. Given this concern, I must conclude that the court-ordered psychiatrist examination poses a threat of coercion

Id. at 1152-53 (citation omitted).

¹²² See Perlin, *Case of Competency*, *supra* note 4, at 630.

¹²³ See *id.* at 628.

¹²⁴ See *id.* at 629.

¹²⁵ See OWENS, *supra* note 5, at ix.

¹²⁶ See, e.g., Prelinger, *Dilemmas of the Expert Witness: Reflections on the Insanity Defense*, 13

III. EFFECTUATING RACIALLY BALANCED TREATMENT AND USE OF THE INSANITY DEFENSE FOR BLACK DEFENDANTS

The criminal justice system has been criticized for its oversensitivity to blacks.¹²⁷ In contrast, the mental health system has been severely criticized for its lack of sensitivity and responsiveness to the black population.¹²⁸ Through Mtumbo Balinka's story, Woychuk illuminates the need for effectuating more racially balanced treatment for black defendants, in both their NRGIs and competency evaluations, who fall between the cracks of the criminal justice and mental health systems.¹²⁹

Traditional mental health programs are staffed by credentialed mental health professionals who are typically white and middle-class.¹³⁰ However, the majority of persons commonly arrested do not share this demographic profile and are often disenfranchised.¹³¹ Consequently, to increase the benefits of case management services to such clients, mental health systems should try to employ case managers who are culturally similar to the clients they serve. Cultural similarity may be more important than an advanced degree.¹³² According to Dr. Charles Owens, even the black mental health professional who graduates from the predominantly white school and who works within the predominantly white institution will rarely grow up devoid of exposure to those elements of his or her environment that allow some insight and understanding of the black experience.¹³³ Such insight and understanding is especially critical in making decisions regarding those black defen-

PSYCHIATRIC ANNALS 237 (1983). The author recommends restrictions on the scope of psychiatric testimony on the ultimate question of responsibility concluding, "I have come to see the merit in the view that psychiatric and psychological expert witnesses should not answer this [ultimate] question. . . . [T]he role of expert witness would be redefined as that of a provider of facts, observations, and qualified inference and opinion." *Id.* at 240. Woychuk also discusses the difficulty of exposing possible biases in diagnoses made by mental health professionals and how they ultimately play out in the aberration of criminal justice for clients such as Mtumbo Balinka. See WOYCHUK, *supra* note 8, at 89-98.

¹²⁷ See OWENS, *supra* note 5, at xvi.

¹²⁸ See *id.* at xvii.

¹²⁹ See generally WOYCHUK, *supra* note 8, at 89-98.

¹³⁰ See Joel A. Dvoskin & Henry J. Steadman, *Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community*, 45 HOSP. & COMMUNITY PSYCHIATRY 679, ? (1994).

¹³¹ See *id.*

¹³² See Villaverde, *supra* note 77, at 244.

¹³³ See OWENS, *supra* note 5, at 130.

dants whose competency to stand trial is in question or whose acquittal depends on the NGRI defense.¹³⁴

In a 1989 article, Dvoskin and Steadman determined that a population of black inmates was not receiving adequate mental health treatment.¹³⁵ They therefore began an active recruiting plan for minority clinicians.¹³⁶ The program that incorporates minority clinicians is especially attractive because it allows the client to feel that he shares commonalities with the person who is handling his case.¹³⁷ Examples of black patient/non-black therapist relationships, such as with Balinka and Dr. Wong, illustrate that there is a cultural gap that cannot be bridged when the patient feels disenfranchised from a system that is designed to help him.¹³⁸ Dr. Alonzo Jones, a prominent black psychiatrist, contends that black therapists can be more effective than white therapists in treating black patients because they have the ability to understand both black and white perspectives.¹³⁹ For instance, Dr. Jones contends that while a white therapist might diagnose someone as having paranoia, a black clinician might view the person's condition as a legitimate viewpoint based upon the power structure of society.¹⁴⁰

The Seventh Circuit case of *Wellman v. Faulkner* makes an important point that "a language barrier between inmate and the physician . . . could interfere with the quality and effectiveness of medical care. An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore pain and suffering."¹⁴¹ This metaphor can carry over into the mental health system.¹⁴² If the patient

¹³⁴ See *id.*

¹³⁵ See Joel A. Dvoskin & Henry J. Steadman, *Chronically Mentally Ill Inmates: The Wrong Concept for the Right Services*, 12 INTL. J.L. & PSYCHIATRY 203, 207 (1989).

¹³⁶ See *id.*

¹³⁷ See generally WOYCHUK, *supra* note 8, at 98-99.

¹³⁸ See *id.* at 86.

¹³⁹ See WOYCHUK, *supra* note 8, at 99.

¹⁴⁰ See *id.* at 98. There is an increasing trend in criminal law whereby a perpetrator of a crime depicts himself as a victim in order to escape criminal liability. See, e.g., ALAN B. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY* 3 (1994). One such defense is called "black rage." See Judd F. Snierson, Note, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, U. PA. L. REV. 2251, 2252 (1995). Black rage describes a mental disturbance caused by long-term exposure to societal racism where as a sappling bent low stores energy for a violent backswing, blacks bent double by oppression have stored energy which will be released in the form of rage—black rage, apocalyptic and final. See generally *id.*

¹⁴¹ See *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983).

¹⁴² See Villaverde, *supra* note 77, at 245.

and the psychologist do not speak the same "cultural language," this may also result in misdiagnoses and similar pain and suffering.¹⁴³ With recruitment of minority clinicians, perhaps some of these misunderstandings can be diffused at an earlier stage.¹⁴⁴

Mtumbo Balinka, one of the most striking client profiles in Woychuk's book, *Attorney for the Damned*, is an example that imparts upon the reader a sense of urgency to effectuate more racially balanced treatment for minorities, especially black defendants.

IV. CONCLUSION

Redesigning the mental health and criminal justice systems to become more racially neutral should be a careful and arduous process. Through the personal experiences of Mtumbo Balinka, a black defendant caught between the cracks of two systems, we are able to see the significance and depth of racial bias and the necessity for redress and reform.

The role and importance of the "neutral expert" both in the competency evaluations and the insanity defense is also recognized in Woychuk's book as being one of the major arsenals behind the perpetuation of bias towards black defendants.¹⁴⁵ Obtaining a valid evaluation has been difficult because of the negative stereotypes that have been imposed on blacks and the utilization of biased assessment instruments. With these factors as backdrops, assessments in competency evaluations and NGRI pleas have tended to portray black defendants in an unfavorable posture.

According to Joel Dvoskin, "judgments about groups of people can only lead to stigma and discrimination, while judgments about individuals if based on reason and information, can lead to better treatment outcomes and increased safety for the individuals and their communities."¹⁴⁶ In order to provide due process and fair treatment, it is extremely important that both the legal and mental health professions be aware of discrimination, and make their decision on conscious, reasoned information so as not to fall victim to unconscious racism.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See generally WOYCHUK, *supra* note 8, at 77-99.

¹⁴⁶ Villaverde, *supra* note 77, at 246 (citing Joel A. Dvoskin, *What Are the Odds of Predicting Violent Behavior*, 2 J. CAL. ALLIANCE FOR MENTALLY ILL 6, 6 (1990)).

Black criminal defendants are over-represented in involuntary commitment, death penalty cases, and discriminatory sentencing. Conversely, they are under-represented in the opportunity to be rehabilitated and evaluated in the manner which would be most suitable to their treatment and eventual return to society.¹⁴⁷ If the criminal justice and mental health systems would work together to purge themselves of the biases that infiltrate their inner workings, those who require treatment might have opportunities to receive the treatment they need.